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Petitioner,

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Respondent.

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BEST AVAILABLE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-913

JOHN R. PATTERSON, TRUSTEE,
Petitioner,

v.

JOSEPH B. SHUMATE, JR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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MOTION FOR LEAVE TO FILE AND BRIEF OF THE ERISA INDUSTRY COMMITTEE AND THE ASSOCIATION OF PRIVATE PENSION AND WELFARE PLANS, INC., AS *AMICI CURIAE* SUPPORTING RESPONDENT

The ERISA Industry Committee ("ERIC") and the Association of Private Pension and Welfare Plans, Inc. ("APPWP"), hereby move, pursuant to Rule 37.4, for leave to file the attached brief *amici curiae* in support of Respondent's position that Section 541(c)(2) of the Bankruptcy Code excludes from a debtor's estate the assets of a pension trust governed by the anti-alienation provision of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1056(d)(1). While Respondent has consented to the filing of this brief, Petitioner has declined to consent. Correspondence reflecting the parties' respective positions has been lodged with the Clerk.

ERIC and APPWP are non-profit organizations that together represent approximately 300 major corporations and

others doing business in a wide variety of industries. Lists of ERIC's and of APPWP's members are set forth in the Appendix to the accompanying brief. ERIC's and APPWP's membership consists of a broad cross-section of major firms that maintain both defined benefit and defined contribution pension plans that are governed by ERISA and are qualified as tax exempt trusts under 26 U.S.C. §§ 401(a) and 501(a). Each of the plans contains the anti-alienation provisions required by 29 U.S.C. § 1056(d)(1). All of ERIC's members and most of APPWP's members do business in more than one state, and some members maintain pension plans that provide benefits for employees in all fifty states. Tens of millions of participants and beneficiaries are covered by ERISA-governed pension plans sponsored by ERIC's and APPWP's members.

This case poses a singularly important issue of statutory construction that has the potential for nationwide effects far beyond the relatively small sum at issue between the parties. Ultimately at stake in this case are the two overarching purposes of ERISA: assurance that pension benefits promised to employees actually will be available to them when they retire, *see Nachman Corp.* v. *Pension Benefit Guaranty Corporation*, 446 U.S. 359, 375 (1980), and Congress's intent that "pension plan regulation [be] exclusively a federal concern," *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981). ERIC's and APPWP's interest in seeing these purposes fulfilled and in other important issues of benefit plan administration has led them to appear as *amicus curiae* in earlier cases in this Court.[1]

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[1] ERIC appeared as *amicus curiae* in *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989); *Metropolitan Life Ins. Co.* v. *Taylor*, 481 U.S. 58 (1987); *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85 (1983); *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 463 U.S. 1 (1983); *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981); and *International Bhd. of Teamsters* v. *Daniel*, 439 U.S. 551 (1979). APPWP appeared as *amicus curiae* in *Public Employees Retirement System of Ohio* v. *Betts*, 492 U.S. 158 (1989).

ERIC and APPWP believe that as *amici curiae* in this case, they can advance arguments relevant to the merits of this case that otherwise will not be advanced by the parties. While the parties no doubt will zealously present their positions on the issues, in litigation between a bankruptcy trustee and an individual debtor, where the amount in issue is comparatively small, the parties' resources to explore the many issues involved in construing Section 541(c)(2) of the Bankruptcy Code understandably are limited. Because the Court's ruling in this case could have a far greater effect on ERIC's and APPWP's members and their employees than it will on the parties, ERIC and APPWP have a greater incentive than do the parties to address these issues in depth. For this reason, ERIC and APPWP believe that the analysis of the statutory language, legislative history and rules of statutory construction presented in Part I of the attached brief is more thorough than the analysis presented by Petitioner and the analysis likely to be presented by Respondent.

Furthermore, ERIC and APPWP bring to this case the perspective of major employers that sponsor large plans with participants and beneficiaries in different states — a perspective broader than that of the parties. The pension plans sponsored by ERIC's and APPWP's members, unlike the plan at issue here, have many thousands or tens of thousands of participants and are not subject to the unilateral control of any one employee-stockholder. Furthermore, most of the pension plans sponsored by ERIC's and APPWP's members operate in more than one state, and ERIC and APPWP therefore are uniquely sensitive to the potentially far-reaching changes in plan administration and employee retirement security that could occur if, as a result of this case, state law becomes the only basis for excluding plan assets from individual bankruptcy estates. For those reasons, ERIC and APPWP believe that the arguments presented in Part II of the attached brief will not be raised by the parties, and will assist the

Court in evaluating the potential impact that adopting Petitioner's reading of Section 541(c)(2) might have on plans sponsored by major employers.

Respectfully submitted,

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March 31, 1992

QUESTION PRESENTED

This brief for The ERISA Industry Committee and the Association of Private Pension and Welfare Plans, Inc., as *amici curiae* is limited to the first question presented by the Petition for Writ of Certiorari herein: whether ERISA's anti-alienation provision, 29 U.S.C. § 1056(d)(1), is an "applicable nonbankruptcy law" under 11 U.S.C. § 541(c)(2), or whether that phrase is limited to state law principles governing spendthrift trusts?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

PAGE

STATUTES AND REGULATIONS

LEGISLATIVE HISTORY

MISCELLANEOUS

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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE ERISA INDUSTRY COMMITTEE AND THE ASSOCIATION OF PRIVATE PENSION AND WELFARE PLANS, INC. AS *AMICI CURIAE* SUPPORTING RESPONDENT

This brief is submitted on behalf of The ERISA Industry Committee ("ERIC") and the Association of Private Pension and Welfare Plans, Inc. ("APPWP"), as *amici curiae* (collectively, "*amici*") supporting Respondent.

INTEREST OF *AMICI CURIAE*

The interest of ERIC and APPWP is set forth in the foregoing Motion for Leave to File.

SUMMARY OF ARGUMENT

The question of statutory construction posed in this case will affect the retirement income security of millions of Americans, and could result in substantial changes in the administration of pension plans, both large and small, nationwide. Section 541(c)(2) of the Bankruptcy Code makes enforceable in a case under Title 11 "[a] restriction on the

transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law . . . ." The Employee Retirement Income Security Act of 1974 ("ERISA"), Pub. L. No. 93-406, 88 Stat. 832, as amended, codified principally at 29 U.S.C. §§ 1001 *et seq.*, requires that each pension plan shall provide that benefits provided under the plan "may not be assigned or alienated." ERISA § 206(d)(1), 29 U.S.C. § 1056(d)(1) (1988).[1] The right of a participant to receive benefits from an ERISA-governed plan is protected from the claims of creditors outside bankruptcy. *See Guidry* v. *Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365 (1990). The question posed in this case is whether that protection is also available in bankruptcy.

In this case and in its earlier decision, *Anderson* v. *Raine* (*In re Moore*), 907 F.2d 1476, 1480-81 (4th Cir. 1990), the Fourth Circuit held that ERISA's anti-alienation provision is an "applicable nonbankruptcy law" within the meaning of Section 541(c)(2), and therefore that a debtor's interest in an ERISA-governed plan is not an asset of the bankruptcy estate. *Shumate* v. *Patterson*, 943 F.2d 362, 365 (4th Cir. 1991).

[1] ERISA defines a "pension plan" as "any plan, fund or program which . . . (i) provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan." 29 U.S.C. § 1002(2)(A) (1988). Pension plans that meet the qualification requirements of the Internal Revenue Code and their participants are accorded advantageous tax treatment. *See generally* I.R.C. §§ 401(a), 402(a), 404(a), & 501(a) (1988).

One of the qualification requirements is that a plan must provide that "benefits provided under the plan may not be assigned or alienated," *i.e.*, a provision that mirrors the requirements of ERISA § 206(d)(1), 29 U.S.C. § 1056(d)(1) (1988). *See* I.R.C. § 401(a)(13) (1988).

Three other courts also have adopted this view.[2] Despite the breadth of the term "applicable nonbankruptcy law," five Circuits have ruled that Section 541(c)(2) excludes from the debtor's estate only assets excludable under state spendthrift trust principles.[3] The limitation of Section 541(c)(2)'s scope to state spendthrift trust law is insupportable as a matter of statutory construction, and jeopardizes fundamental national policies regarding retirement income security.

I.

The phrase "applicable nonbankruptcy law" is not defined in the Bankruptcy Code, and therefore must be interpreted according to the ordinary meaning of its terms. That meaning, as established by dictionary definitions, judicial usage, and the meaning Congress attached to the phrase elsewhere in Title 11 and in Title 28, clearly includes federal statutory law such as ERISA. The ordinary meaning of the term "applicable nonbankruptcy law" cannot be limited to state law principles governing spendthrift trusts.

Section 541(c)(2) is not a "rare and exceptional" instance in which the Court need go beyond the plain meaning of the

[2] *See Gladwell* v. *Harline* (*In re Harline*), 950 F.2d 669 (10th Cir. 1991); *Velis* v. *Kardanis*, 949 F.2d 78 (3d Cir. 1991); *and Forbes* v. *Lucas* (*In re Lucas*), 924 F.2d 597 (6th Cir. 1991), *cert. denied sub nom. Forbes* v. *Holiday Corp. Savings and Retirement Plan*, 111 S. Ct. 2275 (1991).

[3] The principal basis for this interpretation is that the pertinent House and Senate Judiciary Committee Reports do not refer to any application of Section 541(c)(2) other than preserving the exclusion under prior law of spendthrift trusts. *See Regan* v. *Ross*, 691 F.2d 81, 84-85 (2d Cir. 1982); *Lichstrahl* v. *Bankers Trust* (*In re Lichstrahl*), 750 F.2d 1488, 1490 (11th Cir. 1985); *Daniel* v. *Security Pacific Nat'l Bank* (*In re Daniel*), 771 F.2d 1352 (9th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986); *Samore* v. *Graham* (*In re Graham*), 726 F.2d 1268, 1271-72 (8th Cir. 1984); *and Goff* v. *Taylor* (*In re Goff*), 706 F.2d 574, 581-82 (5th Cir. 1983).

statutory terms. This Court is not required to construe the words "applicable nonbankruptcy law" to mean less than they plainly do simply because the House and Senate Judiciary Committee Reports accompanying the Bankruptcy Reform Act do not state that protecting the assets of ERISA-governed plans was an additional purpose of Section 541(c)(2). Statutes often have effects that are not specifically mentioned in their legislative histories.

Even if the meaning of the phrase "applicable nonbankruptcy law" in Section 541(c)(2) were tethered to the legislative history, that history does not show that the *only* purpose of Section 541(c)(2) was to protect the assets of spendthrift trusts. The rationale for Congress's protection of spendthrift trusts applies equally well to the protection of ERISA-governed pension plans.

Interpreting Section 541(c)(2) to apply to the assets of ERISA-governed plans does not render Section 522(d)(10)(E) of the Bankruptcy Code superfluous. The latter section excludes from a debtor's estate only certain *distributions* received from pension plans, whereas Section 541(c)(2) excludes the corpus of ERISA-governed pension trusts. Section 522(d)(10)(E) cannot be construed as an exemption for *undistributed* plan assets.

II.

Interpreting Section 541(c)(2) to apply only to spendthrift trusts would violate two fundamental policies regarding retirement income security that this Court repeatedly has endorsed: enforcement of Congress's desire that retirement income and savings benefits promised to American workers will in fact be available to them upon their retirement, and enforcement of Congress's desire that pension plan regulation be governed exclusively by federal law.

If the assets of ERISA-governed trusts are not excluded from debtors' estates, then some plan participants will lose

their pension funds, perhaps at an age when they cannot hope ever again to build a retirement nest egg. That result is incompatible with ERISA's purposes of ensuring that promised pension benefits will in fact be available, and that employees will not look principally to public support when they reach retirement age or are no longer able to work. It is difficult to believe that in the Bankruptcy Reform Act, Congress would abrogate fundamental premises of national retirement income policy, much less that it would do so *sub silentio* in House and Senate Judiciary Committee Reports.

If Sections 541(c)(2) is interpreted to apply only to state-law spendthrift trusts, then state law will govern whether their assets are immune from the claims of bankruptcy creditors — a result clearly inconsistent with this Court's adherence to the principle that employee benefit plan regulation be governed exclusively by federal law. Deviation from this principle will expose plan sponsors and fiduciaries to unnecessary administrative costs, and potential liability. If only state spendthrift trust principles can shield undistributed plan assets from bankruptcy claims, plan fiduciaries may be faced with claims of liability if they fail to restructure their plans wherever possible as spendthrift trusts. Plan fiduciaries may be forced repeatedly to defend the state law status of their plans before many bankruptcy courts nationwide. Most significantly, if the Internal Revenue Service determines that a turnover of plan assets to a bankruptcy court is a prohibited distribution under ERISA, and disqualifies the plan from favorable federal income tax treatment, *all* the participants in the plan will lose the tax benefits on which their retirement income largely depends. Thus, the bankruptcy of one employee could jeopardize the retirement income of thousands of his or her coworkers.

These radical departures from national retirement income policy will provide a windfall to creditors, permitting them to reach assets in bankruptcy that they cannot look to outside

bankruptcy. The inclusion of pension assets in the estates of all debtors cannot be justified as a means of preventing the small minority of plan participants who can control the amount of contributions to their plans from sheltering assets. A less drastic remedy aimed only at such practices is available. Thus, there is no reason to deny Section 541(c)(2) its full meaning.

ARGUMENT

I. SECTION 541(c)(2) OF THE BANKRUPTCY CODE MUST BE CONSTRUED TO EXCLUDE FROM THE BANKRUPTCY ESTATE THE ASSETS OF AN ERISA-GOVERNED PLAN.

A. The Statutory Language On Its Face Excludes From the Bankruptcy Estate the Assets of Any Trust the Transfer of a Beneficial Interest in Which is Restricted by ERISA.

In cases of statutory construction, this Court begins with the language of the statute. *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 56 (1987); *Summit Valley Industries, Inc.* v. *Local 112, United Brotherhood of Carpenters*, 456 U.S. 717, 722 (1982); *Diamond* v. *Chakrabarty*, 447 U.S. 303, 308 (1980); *Southeastern Community College* v. *Davis*, 442 U.S. 397, 405 (1979). *See also Morrison-Knudsen Construction Co.* v. *Director, Office of Workers' Compensation Programs*, 461 U.S. 624, 630 (1983). In construing the statutory language, "it should be generally assumed that Congress expresses its purposes through the ordinary meaning of the words it uses." *Escondido Mutual Water Co.* v. *La Jolla Band of Mission Indians*, 466 U.S. 765, 772 (1984). *See also United States* v. *James*, 478 U.S. 597, 604 (1986). Unless the words or phrases to be construed are defined terms, they must be

interpreted "as taking their ordinary, contemporary, common meaning." *Diamond, supra*, 447 U.S. at 308 (quoting *Perrin* v. *United States*, 444 U.S. 37, 42 (1979). "[I]f the statute is clear and unambiguous, 'that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" *Sullivan* v. *Stroop*, 110 S. Ct. 2499, 2502 (1980) (quoting *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 291-92 (1988)); *Mobil Oil Exploration & Producing Southeast Inc.* v. *United Distribution Cos.*, 111 S. Ct. 615, 623 (1991).[4]

The statutory language in issue here — "applicable nonbankruptcy law" — is neither a defined term nor composed of defined terms. The ordinary meaning of the words "applicable nonbankruptcy law," as illuminated by dictionary definitions and other evidence of "ordinary, contemporary and common" usage, undeniably encompasses federal statutory law except for Title 11 itself. Furthermore, an examination of the judicial and legislative use of the phrase at or near the time the Bankruptcy Reform Act was passed confirms that "applicable nonbankruptcy law" was understood to include federal statutory law, and suggests that "applicable nonbankruptcy law" was used in the Act to refer to any rule of decision that would govern a given controversy if that controversy arose outside the context of Title 11.[5]

1. Legal and general dictionaries establish that the ordinary meaning of the words "applicable nonbankruptcy

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[4] *See also Business Guides, Inc.* v. *Chromatic Communications Enterprises, Inc.*, 111 S. Ct. 922, 928 (1991) ("As with a statute, our inquiry is complete if we find the text of the Rule to be clear and unambiguous").

[5] *Cf., e.g., Liscinski* v. *Mosley* (*In re Mosley*), 42 B.R. 181, 191 (Bankr. D.N.J. 1984) (the phrase "applicable nonbankruptcy law" in Section 541(c)(2) "refer[s] to all law that might normally apply outside of bankruptcy proceedings").

law" extends at least as far as federal statutory law, other than Title 11 itself.[6] The ordinary meaning of the word "law" is broad enough to encompass federal statutory law, and the modifiers "applicable" and "nonbankruptcy" certainly do not limit the word "law" to exclude ERISA.[7] "Law, in its generic sense, is a body of rules of action or conduct prescribed by controlling authority, and having binding legal force . . . 'law' generally contemplates both statutory and case law . . . ." *Black's Law Dictionary* at 884 (citations omitted).[8] As recently as last year, this Court explained that "nonbankruptcy law that creates substantive claims . . . include[s] . . . claims that have their source in substantive federal law . . . ." *Grogan* v. *Garner*, 111 S. Ct. 654, 658 n.9 (1991). Thus, "nonbankruptcy law" clearly includes federal statutes such as ERISA.

2. The dictionary definitions that establish the ordinary meaning of the words "applicable nonbankruptcy law" are confirmed by judicial usage roughly contemporaneous with

[6] This Court often relies on legal and general dictionaries to ascertain the ordinary meaning of statutory terms. *See, e.g.*, *Holywell Corp.* v. *Smith*, 60 U.S.L.W. 4163, 4165 (February 25, 1992); *Gollust* v. *Mendell*, 111 S. Ct. 2173, 2179 & n.7 (1991); *Dennis* v. *Higgins*, 111 S. Ct. 856, 871 (1991); *James*, *supra*, 478 U.S. at 597 n.6. Although dictionary definitions are not sufficient to establish the precise meaning of the statutory phrase "applicable nonbankruptcy law," they do establish that the ordinary meaning of those words cannot exclude ERISA.

[7] "Applicable" is defined to mean "[f]it, suitable, pertinent, related to or appropriate; capable of being applied." *Black's Law Dictionary* 98 (6th ed. 1990). The primary definition of "applicable" is "capable of being applied: having relevance." *Webster's Third New International Dictionary of the English Language, Unabridged* at 105 (1976). The adjective "applicable," then, conveys no limitation on the category or source of the legal rules referred to by the noun "law."

[8] *See also Webster's Third International* at 1279; *cf. Norfolk & Western Ry. Co.* v. *American Train Dispatchers Ass'n*, 111 S. Ct. 1156, 1163 (1991) ("By itself, the phrase 'all other law' indicates no limitation").

the adoption of the Bankruptcy Reform Act of 1978, and by legislative usage of that phrase both in Title 11 itself and in Title 28. Given judicial and legislative use of the words "applicable nonbankruptcy law" to include federal statutory law, any suggestion that the phrase as used in Section 541(c)(2) is ambiguous is insupportable. *West Virginia University Hospital, Inc.* v. *Casey*, 111 S. Ct. 1138, 1147 (1991).[9]

a. Both shortly before and after the passage of the Bankruptcy Reform Act, courts used the phrase "nonbankruptcy law" in contexts where it clearly included federal law. In 1969, the Third Circuit stated that under 11 U.S.C. § 107(c)(1)(B) (1964), "the basic test of a lien's validity [is] whether under state or federal nonbankruptcy law the lien was perfected against bona fide purchasers." *In re Century Vault Co.*, 416 F.2d 1035, 1038 (1969). In *Securities and Exchange Commission* v. *North American Planning Corporation*, Fed. Sec. L. Rep. [CCH] ¶ 95,326, at 98,644 (E.D. Pa. 1975), the court observed that a trustee's rights to avoid transfers under § 70(e)(1) of the Bankruptcy Act, then codified at 11 U.S.C. § 110(e)(1), "depend on nonbankruptcy law, typically state law."

Similarly, in the years after 1978, courts used the words "applicable nonbankruptcy law" to include federal law where federal law supplied the pertinent rule of decision in a proceeding under Title 11. In *United States* v. *Darnell* (*In re Darnell*), 834 F.2d 1263, 1266, 1269 (6th Cir. 1987), the

[9] While it is sufficient for an affirmance in this case merely to show that the words "applicable nonbankruptcy law" do not exclude ERISA, judicial and legislative use of the phrase "applicable nonbankruptcy law" suggests that the precise meaning of that phrase in Title 11 is "any law, state or federal, that would be applicable to a given issue if that issue arose outside the context of a case under Title 11." Under this definition § 541(c)(2)'s reference to "applicable nonbankruptcy law" clearly includes ERISA.

"applicable nonbankruptcy law" governing the relative priority in bankruptcy of state and federal tax liens was held to be the "first in time, first in right" principle enunciated in *United States* v. *New Britain*, 347 U.S. 81 (1954), because "the competing liens involve a federal tax, [and therefore] federal law controls." Similarly, in *Pearlstein* v. *United States Small Business Administration*, 719 F.2d 1169, 1176 (D.C. Cir. 1983), it was held that the comparative priority of a Small Business Administration lien and a District of Columbia sales tax lien was to be determined by "pertinent nonbankruptcy lien law," and that "[s]ince the nontax lien is that of the United States . . . federal law governs . . . ." *Accord*, *Bavely* v. *Internal Revenue Service* (*In re Terwilliger's Catering Plus, Inc.*), 911 F.2d 1168, 1176 (6th Cir. 1990) ("Where one of the competing liens is a federal tax lien, the applicable bankruptcy law that determines the priority between the liens is federal law"), *cert. denied sub nom. Ohio Department of Taxation* v. *Internal Revenue Service*, 111 S. Ct. 2815 (1991).

To be sure, the case law sometimes uses "nonbankruptcy law" to refer to state law.[10] However, the equation of nonbankruptcy law with state law merely acknowledges that, in most instances, state law creates and governs the property

[10] In *Caruso Enterprises, Inc.* v. *Bumb* (*In re Wonderbowl, Inc.*), 456 F.2d 954, 956 (9th Cir. 1972), for example, the court held that a bankruptcy court should decline to adjudicate a matter better left to plenary litigation "where important questions turning on nonbankruptcy law are involved," citing, *inter alia*, *Thompson* v. *Magnolia Petroleum Co.*, 309 U.S. 478, 483 (1940), a case in which this Court held that bankruptcy courts should "consent to submission to state courts of particular controversies involving unsettled questions of state property law . . . ." The Ninth Circuit was more blunt in *Vanderpark Properties, Inc.* v. *Buchbinder* (*In re Windmill Farms, Inc.*), 841 F.2d 1467, 1469 (1988): "The phrase 'applicable nonbankruptcy law' [in 11 U.S.C. § 365(c)(3)] means applicable state law."

interests at stake in a Title 11 case.[11] "State law" is sometimes used as a short-hand expression for all law, state and federal, that determines an issue in question. Indeed, only last year this Court held that "The validity of a creditor's claim [against a bankruptcy estate] is determined by rules of state law," but explained:

> We use the term state law expansively herein to refer to all nonbankruptcy law that creates substantive claims. We thus mean to include in this term claims that have their source in substantive federal law, such as federal securities law or other federal antifraud laws.

Grogan v. *Garner*, *supra*, 111 S. Ct. at 657-58 and n.9.

b. Congress's use of the term "applicable nonbankruptcy law" establishes that it understood that phrase to include federal law. In fact, it appears that Congress used the phrase "applicable nonbankruptcy law" to refer to any body of law, state or federal, that would supply the rule of decision pertinent to a given issue if the issue arose outside the context of bankruptcy.

I. The best evidence of Congress's understanding of the phrase "applicable nonbankruptcy law" is the use to which that phrase was put elsewhere in portions of Title 11 enacted by the Bankruptcy Reform Act of 1978.[12] In addition to Section 541, nine such sections or subsections use the phrase "applicable nonbankruptcy law": 11 U.S.C. §§ 363(f)(1), 365(h)(1), 510, 522(b)(2)(B), 524(c), 552(b), 1125(d), 1126(b)(1), and 1142(a). Three of these sections on their face compel the conclusion that Congress understood "applicable

[11] *See, e.g.*, *Pearlstein*, *supra*, 719 F.2d at 1176, *and Atlantic Richfield Co.* v. *Herbert* (*In re Herbert*), 806 F.2d 889, 892 (9th Cir. 1986).

[12] *See Morrison-Knudsen*, *supra*, 461 U.S. at 633 ("[A] word is presumed to have the same meaning in all subsections of the same statute").

nonbankruptcy law" to include federal statutory law. The phrase "applicable nonbankruptcy law" in Sections 1125(d) and 1126(b)(1), which concern disclosure in connection with acceptance or rejection of reorganization plans, clearly includes federal statutes regulating securities.[13] Similarly, Section 363(f)(1) permits the sale of estate property free and clear of the interest of a third party if such a sale is permitted under "applicable nonbankruptcy law," a phrase that includes federal law.[14]

II. The Bankruptcy Improvements and Federal Judgeship Act of 1984 added five additional references in Title 11 to "applicable nonbankruptcy law." 11 U.S.C.A. §§ 101(56)[2d], 108(a)-(c), 927, 943, and 1123.[15] Once again, several of the references to "applicable nonbankruptcy law" clearly include federal law. For example, Section 108(a) extends unexpired statutes of limitations fixed, *inter alia*, by "applicable nonbankruptcy law," including statutes of

[13] *See Public Service Co. of New Hampshire* v. *Consolidated Utilities and Communications, Inc.*, 846 F.2d 803, 808 (1st Cir. 1988) and *see also* the House Judiciary Committee Report accompanying H.R. 8200, which became Pub. L. No. 95-598, H.R. Rep. No. 595, 95th Cong., 1st Sess. (1977) at 409-10.

[14] *See* Pub. L. No. 100-710, Title I, § 106(b)(2) and 102(c), 102 Stat. 4746, 4752 (Nov. 23, 1988), repealing and replacing the Ship Mortgage Act of 1920, 46 U.S.C. § 911 *et seq.*, which governs foreclosure of certain maritime liens and specifies the conditions under which a vessel of the United States can be sold free from pre-existing claims in certain foreclosure sales.

[15] Section 102(a) of the Act also added Section 1411 of Title 28 of the United States Code, which provides in relevant part that except as ordered by a district court in an involuntary case under Title 11, neither Title 28 nor Title 11 "affect any right to trial by jury that an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim." The right to a trial by jury in personal injury and wrongful death claims may be conferred by federal statutory law. *See, e.g.*, the Jones Act, Act of June 5, 1920, ch. 250, § 33, 41 Stat. 1007, codified at 46 U.S.C.A. app. § 688 (1988).

limitations arising under the Federal Tort Claims Act. *Eagle-Picher Industries, Inc.* v. *United States*, 937 F.2d 625, 639-40 (D.C. Cir. 1991). Section 108(b) extends unexpired periods arising under "applicable nonbankruptcy law" for, *inter alia*, filing claims under the Internal Revenue Code. *Brickley* v. *Internal Revenue Service* (*In re Brickley*), 70 B.R. 113, 115-16 (Bankr. App. 9th Cir. 1986) (per curiam). Section 108(c) extends against the debtor certain statutes of limitations arising under "applicable nonbankruptcy law," including the Racketeer Influenced and Corrupt Organizations Act. *Eisenberg* v. *Feiner* (*In re Ahead by a Length, Inc.*), 100 B.R. 157, 162-63 (Bankr. S.D.N.Y. 1989).

III. Pub. L. No. 100-506, 102 Stat. 2538 (Oct. 18, 1988), added subsection 365(n) to the Bankruptcy Code to protect the rights "under applicable nonbankruptcy law" of licensees of intellectual property. As used in Section 365(n)(1)(B), the phrase "applicable nonbankruptcy law" refers to, *inter alia*, federal copyright laws. *Gladwell*, 950 F.2d at 674 (dictum); *Velis, supra*, 949 F.2d at 81 (dictum).[16]

IV. Petitioner is correct to point out that the phrase "applicable nonbankruptcy law" is sometimes used in Title 11 in circumstances where the only law to be applied is state law. *See* Pet. Br. 35, citing Section 522(b)(2)(B), pertaining to tenancies by the entireties. But the phrase "applicable nonbankruptcy law" refers to state law in such contexts *not* because the meanings of the words "applicable nonbankruptcy law" have changed, but because they are used in contexts

[16] The Senate Judiciary Committee Report on S. 1626, which became Pub. L. No. 100-506, S. Rep. No. 505, 100th Cong., 2d Sess. (Sept. 14, 1988), *reprinted in* 1988 U.S. Code Cong. & Adm. News 3200, 3204-05, uses the phrase "applicable nonbankruptcy law" as a synonym for "federal or state law, statutory or common law."

where, as it happens, only state law can supply the pertinent rule of decision.[17]

3. This Court has indicated that there can be "rare and exceptional" circumstances under which the Court's inquiry will not stop at the unambiguous meaning of the statutory text.[18] In particular, the Court sometimes has suggested that where there has been a "'clearly expressed legislative intent to the contrary'" of the ordinary meaning of the words employed, the ordinary meaning may not control. *Escondido Mutual Water Co., supra*, 466 U.S. at 772, quoting *North Dakota* v. *United States*, 460 U.S. 300, 312 (1983), quoting *Consumer Products Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).[19] This is not an appropriate case for the Court to invoke the "rare and exceptional" circumstances exception to entertain interpretations of Section 541(c)(2) that deviate from its plain meaning. To adopt a reading of the Bankruptcy Code that runs counter to the clear meaning of the statutory text requires meeting an "exceptionally heavy" burden. *See Union Bank* v. *Wolas*, 112 S. Ct. 527, 530 (1991) (citing *United States* v. *Ron Pair*

[17] Even the Fifth Circuit in *Goff*, 706 F.2d at 586 n.33, disclaimed reliance on Section 522(b)(2), concluding that the reasoning in opinions interpreting the words "applicable nonbankruptcy law" in Section 522(b) to refer only to state law were "not wholly applicable to the case at hand because the only law defining such property interests is state law." *Id.*

[18] *See, e.g.*, *Freytag* v. *Commissioner*, 111 S. Ct. 2631, 2636 (1991); *Demarest* v. *Manspeaker*, 111 S. Ct. 599, 604 (1991) (citing *Burlington Northern Ry. Co.* v. *Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987)); *Rubin* v. *United States*, 449 U.S. 424, 430 (1981); *TVA* v. *Hill*, 437 U.S. 153, 187 n.33 (1978).

[19] *See also United States* v. *Turkette*, 452 U.S. 576, 580 (1981) (quoting *Consumer Prods. Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)) ("If the statutory language is unambiguous," then "in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive'").

Enterprises, Inc., 489 U.S. 235, 241-42 (1989)).[20] That burden has not been met here, either in the suggestion that the legislative history requires a narrow reading of Section 541(c)(2), or in the suggestion that Section 522(d)(10)(E) of the Bankruptcy Code would be rendered superfluous by the literal meaning of Section 541(c)(2).[21]

B. The Legislative History of Section 541(c)(2) Does Not Warrant Narrowing Its Scope.

The essence of the primary interpretive argument adopted by the Second, Fifth, Eighth, Ninth and Eleventh Circuits, and by Petitioner, is that the general category created by the literal interpretation of the words "applicable nonbankruptcy law" should be limited to the specific class of laws referred to in the legislative history. *Regan* v. *Ross*, *supra*, 691 F.2d at 85; *Goff*, *supra*, 706 F.2d at 581-82; *Graham*, *supra*, 726 F.2d at 1271-72; *Lichstrahl*, *supra*, 750 F.2d at 1490; *Daniel*, *supra*, 771 F.2d at 1359-60 n.17. Pet. Br. at 28, 38-39. This argument cannot be countenanced because "[i]t is not the law that a statute can have no effects which are not explicitly mentioned in its legislative history." *Pittston Coal*

[20] *See also Mansell* v. *Mansell*, 490 U.S. 581, 592 (1989) (Where statutory language is "plain and precise," one who would interpret a statute contrary to its literal meaning "faces a daunting standard. She cannot prevail without clear evidence that reading the language literally would thwart the obvious purposes of the Act").

[21] Following the lead set by *Goff*, *supra*, 706 F.2d at 586-87, Petitioner also urges that ERISA § 514(d), 29 U.S.C. § 1144(d), requires that Section 541(c) be interpreted not to include ERISA among "applicable nonbankruptcy law[s]." Pet. Br. 15-16. This argument is based on a misconception. ERISA § 514(d) provides only that, subject to certain exceptions not germane to the issue here, nothing in Subchapter I of ERISA will be construed "to alter, amend, modify, invalidate, impair or supersede any law of the United States . . . ." It is not suggested that Subchapter I of ERISA should be construed to alter or impair any provision of the Bankruptcy Code. Only the construction of Section 541(c)(2) of the Bankruptcy Code is in issue in this case.

Group v. *Sebben*, 109 S. Ct. 414, 420-21 (1988). Furthermore, a careful reading of the legislative history does not support the limitation for which Petitioner argues.

1. This Court has made clear that legislative history may not be used to narrow the scope of a statutory term. *West Virginia University Hospitals., Inc., supra*, 111 S. Ct. at 1147 ("Where [the statutory text] contains a phrase that is unambiguous — that has a clearly accepted meaning in both legislative and judicial practice — we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process"). In particular, "[t]his Court has never required that every permissible application of a statute be expressly referred to in its legislative history." *Moskal, supra*, 111 S. Ct. at 467.[22] Even if Congress did not foresee that the phrase "applicable nonbankruptcy law" would encompass more than merely state law principles governing spendthrift trusts, the statutory language should be given its full effect. *See Union Bank* v. *Wolas, supra*, 112 S. Ct. at 531 (citing *Toibb* v. *Radloff*, 111 S. Ct. 2197 (1991)).

Furthermore, in *Pittston Coal Group, supra*, 488 U.S. at 115 (1988), this Court rejected categorically an argument of the precise form adopted by the *Goff* line of cases. There, the Secretary of Labor argued that only medical criteria came within a statutory mandate in Section 2(c) of the Black Lung Benefits Reform Act of 1977 ("BLBRA")[23] to establish interim criteria for certain categories of disability claims that

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[22] *See also Davis* v. *Michigan Dept. of the Treasury*, 489 U.S. 803, 808 n.3 (1989) ("The language of the statute leaves no room for doubt . . . so the State's attempt to establish a minor inconsistency with the legislative history need not detain us. Legislative history is irrelevant to the interpretation of an unambiguous statute").

[23] Pub. L. No. 95-239, 92 Stat. 95, codified as amended at 30 U.S.C. § 902(f).

were no more restrictive than those in force on a specified date before the passage of the BLBRA, because the legislative history disclosed an intention to preserve only the prior medical criteria. *Id.* at 115. By comparison with the legislative history relied upon in *Goff*, there were numerous references in the legislative history of the BLBRA lending considerable support to the Secretary's argument in *Pittston*. *See id.* at 134-45 (Stevens, J., dissenting). Nonetheless, this Court flatly rejected the notion that a general statutory term can be narrowed by legislative history that referred to a more limited and specific purpose.

2. The legislative history of § 541(c)(2) on which *Goff* and its progeny so heavily rely does not justify constricting the meaning of the phrase "applicable nonbankruptcy law." At most, the House Judiciary Committee Report merely demonstrates that state spendthrift trust principles are one example of "applicable nonbankruptcy law" that is enforceable under the Bankruptcy Code. H. Rep. No. 95-595, *supra*, 369. *See also* S. Rep. No. 989, 95th Cong., 2d Sess. at 82. Nothing in the report suggests that § 541(c)(2)'s scope is *limited* to state spendthrift trusts.[24] Indeed, the rationale suggested by the House Report for excluding from the estate the debtor's interest in a spendthrift trust is equally applicable, *mutatis mutandis*, to excluding ERISA-governed pension plans. After explaining that the bill would continue to exclude spendthrift trusts from the debtor's estate, the Report states, "The bankruptcy of the beneficiary should not be permitted to defeat the legitimate expectations of the settlor of the trust." H.R. Rep. No. 95-595 at 176.

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[24] *Cf. Perrin, supra*, 444 U.S. at 45 ("The record of the hearings and floor debates [on the Travel Act, 18 U.S.C. § 1952] discloses that Congress made no attempt to define the statutory term 'bribery,' but relied on the accepted contemporary meaning. There are ample references to the bribery of state and local officials, but there is no indication that Congress intended to so limit its meaning").

Both the legitimate expectations of plan sponsors that their employees will be provided for, and the legitimate expectation of Congress that pension benefits promised to employees actually will be paid, are at least as deserving of consideration as the desire of private settlors to pass on accumulated wealth to heirs who are (or are feared to be) wastrels.

C. Reading Section 541(c)(2) to Apply to ERISA-Governed Plans Does Not Render Section 522(d)(10)(E) Superfluous.

Petitioner urges that interpreting Section 541(c)(2) to exclude the assets of ERISA-governed plans will render Section 522(d) (10)(E) of the Bankruptcy Code "an effective nullity," and therefore offend the canon of construction that counsels against construing one portion of an act so as to render another portion superfluous. Pet. Br. 29-30. This argument rests on the misconception that exclusion of pension plan assets from the debtor's estate under Section 541(c)(2) would render Section 522(d)(10)(E) superfluous.

Section 522(d)(10)(E) excludes from the debtor's estate only certain *distributions* received from pension plans, and only in an amount "reasonably necessary for the support of the debtor and any dependent[s]." *See Gladwell, supra*, 950 F.2d at 675; *Velis, supra*, 949 F.2d at 81. Section 541(c)(2), on the other hand, excludes from the debtor's estate only the undistributed corpus of a pension trust. Section 541(c)(2) requires the enforcement in bankruptcy of restrictions on the transfer of the debtor's beneficial interest only if that interest is "in a trust"; its protection does not extend to pension distributions, which are free of the trust. *Cf., e.g., Minot* v. *Minot*, 319 Mass. 253, 66 N.E.2d 5, 15 (1946). Far from being superfluous, Section 522(d)(10)(E) serves a function separate from that served by Section 541(c)(2). Section 541(c)(2) gives effect to ERISA's policy of ensuring the future availability of pension payments by

protecting the fund that someday will finance those payments. By contrast, Section 522(d)(10)(E) treats current distributions from pension plans not needed for the debtor's support as available to creditors.

Petitioner is simply wrong to suggest the language of Section 522(d)(10)(E) is broad enough to cover a debtor's right to future payments from a pension fund. Pet. Br. 32. Just as the debtor's "interest" in the various kinds of exempt property listed in Section 522(d)(1)-(9) refers only to his or her present possessory interest in such property,[25] so "the debtor's right to receive . . . a payment" under a pension plan referred to in Section 522(d)(10) clearly means only a right to *current* payment. Each item in the list of exemptions should be interpreted to be of the same kind as the others.[26]

The legislative history of Section 522(d) confirms that the pension exemption does not apply to future payments or undistributed pension funds. Section 522(d)'s exemptions were "derived in large part from the Uniform Exemptions Act, promulgated by the Commissioners of Uniform State Laws in August, 1976." H.R. Rep. No. 95-595 at 361. However, Section 522(d)(10)(E) omits language that was contained in Section 6(a) of the Uniform Exemptions Act, the provision governing pensions, that could have been construed to subject pension plan assets (in excess of those needed for

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[25] *Cf. White* v. *Stump*, 266 U.S. 310, 312 (1924) (bankruptcy exemptions to be determined as of the time of filing).

[26] *Cf. Dole* v. *United Steelworkers of America*, 110 S. Ct. 929, 935 (1990) ("The traditional canon of construction, *noscitur a sociis*, dictates that 'words grouped in a list should be given related meaning'") (citation omitted). *But see American Honda Fin. Corp.* v. *Dairyland Ins. Agency (In re Cilek)*, 115 B.R. 974, 978-79 (Bankr. W.D. Wis. 1990) (11 U.S.C. § 522(d)(10)(E) limited by debtor's right to receive payments, not by actual receipt).

support) to creditors' claims.[27] Congress omitted the Uniform Exemption Act's reference to pension plan assets when it drafted Section 522(d)(10)(E), because that section did not concern plan assets, and merely conferred a limited exemption on the right to receive pension payments.[28]

D. The Exclusion from the Debtor's Estate of Assets Held in a Trust Other Than a Spendthrift Trust is Not a Departure From Pre-Code Law.

In several cases, this Court has held that a provision of the Bankruptcy Code will not be interpreted to alter pre-Code law absent clear evidence of congressional intent to accomplish such an alteration. *See Midlantic National Bank* v. *New Jersey Dept. of Environmental Protection*, 474 U.S. 494, 501 (1986); *Kelly* v. *Robinson*, 479 U.S. 36 (1986). Petitioner seizes on these cases, and on the dissent in *Ron Pair Enterprises, supra*, 489 U.S. at 252 (O'Connor, J., dissenting), to argue that Section 541(c)(2) cannot be interpreted to apply to any circumstances other than state law spendthrift trusts absent a clear indication of congressional intent to so expand pre-Code law.[29]

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[27] *Compare* 11 U.S.C. § 522(d)(10)(E) (1988) *with* Uniform Exemptions Act § 6, 13 U.L.A. 224 (1986) ("[a]n individual is entitled to exemption of the following property to the extent reasonably necessary for the support of him and his dependents: . . . (5) *assets held*, payments made, and amounts payable under a stock bonus, pension, profit-sharing, annuity, or similar plan . . . .") (emphasis added).

[28] Even Section 6(a) of the Uniform Exemptions Act does not permit levy on all assets of an ERISA-governed plan. *See* Comment 5 to § 6(a).

[29] It is not clear that the approach of *Midlantic* and *Kelly* applies to Section 541(c)(2), since Section 541 represented a new conscious departure from pre-Code law. "Section 541 reflects a new concept concerning property of the estate under the Code. This new concept is the substantial departure under the Code from the extensive reliance of the Bankruptcy Act on nonbankruptcy law, usually state law, to determine what property will come in the estate." 4 *Collier on Bankruptcy* ¶ 541.02[1] (15th ed. 1992).

Even if it were clear that the approach taken by those cases applied, as Petitioner himself notes, under pre-Code law "[whether] property of a debtor [was] subject to the reach of his creditors in bankruptcy depended on whether a particular asset was either in alienable or leviable form." Pet. Br. at 20 (citing *Segal* v. *Rochelle*, 382 U.S. 375, 379 (1966)). The assets of an ERISA-governed plan are not in "alienable or leviable form." *See Guidry*, *supra*, 493 U.S. at 371-72.

Amici have been unable to find any opinion written before adoption of the Bankruptcy Reform Act deciding whether the assets of an ERISA-governed trust were excluded from the bankrupt's estate under Section 70 of the Bankruptcy Act, formerly codified at 11 U.S.C. § 110. However, several decisions under the Bankruptcy Act rendered after the enactment of the Bankruptcy Code held that assets in an ERISA-governed plan, which the debtor had no present right to receive, did not become assets of the estate.[30] Similarly, in *Tennessee Valley Authority* v. *Kinzer*, 142 F.2d 833 (6th Cir. 1944), the Sixth Circuit held that an employee's contributions to a plan (which contained restrictions imposed under federal law prohibiting transfer, assignment or encumbrance of the plan assets) were not assets of the bankruptcy estate, notwithstanding that those contributions would have been reachable by creditors under state spendthrift trust principles, because the employee had no immediate right to receive payment from the fund on the date he was adjudicated

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[30] *See Turpin* v. *Wente (Matter of Turpin)*, 644 F.2d 472, 474 (5th Cir. 1981); *Mason* v. *Eastman Kodak Co.* (*Matter of Parker*), 473 F. Supp. 746, 751 (W.D.N.Y. 1979) (employee savings plan assets payable upon termination, but employee had power, as limited by the Internal Revenue Code, to borrow against the fund and to withdraw funds in the event of hardship). *But see Dunlavey* v. *Newnum (In re Newnum)*, 2 B.R. 500 (Bankr. D. Ariz. 1980).

Of course, *amici* do not suggest that Section 541(c)(2) represents a codification of the results in *Turpin* and *Parker*. *Cf. Midlantic*, *supra*, 474 U.S. at 498. However, *Turpin* and *Parker* illustrate principles of pre-Code law that are consistent with Respondent's interpretation of Section 541(c)(2).

a bankrupt.[31] The current exclusion of the assets of ERISA-governed plans can be viewed as a continuation (as well as an amplification) of these cases.

II. THE NARROW INTERPRETATION OF SECTION 541(c)(2) ADVOCATED BY THE PETITIONER CONFLICTS WITH FUNDAMENTAL NATIONAL RETIREMENT INCOME POLICIES.

An interpretation of Section 541(c)(2) that limits its operation to only those trusts qualifying as spendthrift trusts under state law would do violence not only to the ordinary language Congress used and the standards for statutory construction this Court has delineated, but also to the two fundamental bases of national retirement income policy that inform ERISA: that promised retirement benefits will be paid, and that all employee benefit plans, including pension plans,[32] will be regulated exclusively by federal law. The consequences of weakening those principles could be far-reaching, both for plan participants and plan fiduciaries. In view of those consequences, it is difficult to believe that Congress intended the Bankruptcy Code to expose plan participants to loss of their pension funds under state law, especially when to do so merely confers a windfall on

[31] In *Standard Oil Co.* v. *Blane (In re Baxter)*, 104 F.2d 318 (1939), the Sixth Circuit reached the same result on the same rationale in the case of a private pension plan.

[32] ERISA divides employee benefit plans into pension plans and "welfare plan[s]," which provide health, accident, vacation and other forms of non-pension benefits. *See* 29 U.S.C. §§ 1002(1)-(3)(1988). *Cf.* ERISA § 3(34)-(35), 29 U.S.C. § 1002(34)-(35), further dividing pension plans into "individual account" or "defined contribution" plans (in which benefits are determined solely by contributions to each participant's account and allocable income and expenses, gains and losses, and forfeitures from other individual accounts), and "defined benefit" plans (in which pay-out generally is made in accordance with a formula prescribed by the terms of the plan).

bankruptcy creditors by giving them access to funds otherwise unavailable to them.

1. If § 541(c)(2) is interpreted to apply only to spendthrift trusts, and § 522(b)(2) is not interpreted to exempt assets of an ERISA-governed trust, then inevitably some American workers — those unlucky enough to be participants in plans that do not satisfy state-law spendthrift trust principles — will lose their pensions, and for some this loss may come when age or disability will prevent their ever again building up a retirement fund.[33] Yet ERISA was enacted precisely to prevent the "great personal tragedy" involved in the loss of retirement funds. *Nachman Corp.* v. *Pension Benefit Guar. Corp.*, 446 U.S. 359, 374 (1980) (quoting Sen. Bentsen, 3 Leg. Hist. 4793).[34] ERISA was designed in part to ensure

[33] In large measure, the impetus for adopting ERISA stemmed from the often horrifying accounts of middle-aged and elderly employees who suddenly found themselves without the pension benefits on which they had been counting. *See, e.g.*, 3 Legislative History of the Employee Retirement Income Security Act of 1974, 94th Cong., 2d Sess. (Comm. Print 1976)("Leg. Hist."), 4811-12 (remarks of Sen. Ribicoff), 3 Leg. Hist. 4698 (remarks of Rep. Annunzio) and *see esp.* 2 Leg. Hist. 1865-71 (remarks of Sen. Kennedy).

[34] *See also Nachman, supra*, 446 U.S. at 375 (one purpose of ERISA is to "mak[e] sure that if a worker has been promised a defined pension benefit upon retirement — and if he has filled whatever conditions are required to obtain a vested benefit — that he actually will receive it"). The protections of ERISA are equally important for defined contribution plans. ERISA was enacted because Congress saw a need for "responsible and comprehensive pension reform . . . to ensure that *every* American working person covered by a pension plan can depend upon that plan to pay benefits to which that person is entitled after retirement." 3 Leg. Hist. 3583 (remarks of Rep. Price) (emphasis added). ERISA's anti-alienation provision and the congressional statement of purposes contained in 29 U.S.C. § 1001 do not distinguish between defined contribution and defined benefit plans.

that upon retirement workers would not become dependent upon public support.[35]

In particular, the purpose of ERISA's anti-alienation provision is to "further ensure that the employee's accrued benefits are actually available for retirement purposes . . . ." H.R. Rep. No. 807, 93rd Cong., 2d Sess. 68 (1974). The anti-alienation provision was designed not only to prevent a participant from improvidently bargaining away his or her retirement benefits voluntarily, but also to protect those benefits against the claims of general creditors. *Cf.* H.R. Rep. No. 1280, 93rd Cong., 2d Sess. 280 (1974). "Section 206(d) represents a considered congressional policy choice, a decision to safeguard a stream of income for pensioners . . . and their dependents . . . ." *Guidry*, *supra*, 493 U.S. at 376.[36] *Amici* submit that ERISA's anti-alienation provision is one of the safeguards included in ERISA "'to completely secure the rights and expectations brought into being by this landmark reform legislation,'" *Ingersoll-Rand Co.* v. *McClendon*, 111 S. Ct. 478, 482 (1990), citing and quoting S. Rep. No. 93-127, p. 36 (1973). *See* H.R. Rep. No. 779, 93d Cong., 2d Sess. 28 (1974), *reprinted in* 2 Leg. Hist. 2617.

In considering ERISA, Congress knew it was concerning itself with the financial security of "literally millions of working men and women." 3 Leg. Hist. 4707 (remarks of Rep. Mathias). ERISA was intended to usher in "a new era"

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[35] *See, e.g.*, 2 Leg. Hist. at 3371 (remarks of Rep. Perkins)(noting the need for adequate pension regulation and minimum Federal standards to "reduce pressure on the Social Security System and reduce the enormous costs of public welfare").

[36] Congress's concern to protect the interests of dependents was manifested again in 1984, when the Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1440-41, amended I.R.C. § 401(a)(11) and added I.R.C. § 417 to protect the rights of spouses to joint and survivor annuities and pre-retirement survivor annuities.

for them by "providing new guarantees that the funds set aside for their retirement — from their own and their employer's contributions — will in fact be available for their retirement years." 3 Leg. Hist. 4819 (remarks of Sen. Packwood). Given the seriousness of Congress's purposes in enacting ERISA, it is difficult to believe that within four years Congress would subvert those purposes in the Bankruptcy Reform Act. It is still more difficult to believe that Congress would undo major premises of national pension policy not by what it said explicitly in the text of the Bankruptcy Reform Act, but *sub silentio*, by failing to mention the protection of pension benefits in a committee report.

2. If Sections 541(c)(2) and 522(b)(2)(A) are interpreted not to apply to ERISA-governed plans, the availability of a participant's plan assets to satisfy the claims of creditors in bankruptcy will depend entirely on state law. To permit state law to control creditors' access to plan assets is to permit state law to regulate pension plans, and ultimately to permit state law to determine the pay-out of benefits to plan participants. That result is inconsistent with *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 524-25 (1981), where this Court struck down a New Jersey statute prohibiting the reduction of pension benefits by workers' compensation awards, because the statute purported to regulate the pay-out of benefits in a fashion inconsistent with federal law.

In addition, if the immunity of plan assets from bankruptcy claims hinges on state law, plan administration will become needlessly more complex, and plan fiduciaries will be burdened with extra duties and exposed to additional hazards. If state spendthrift trust law governs whether pension assets are available to creditors in bankruptcy, employers will feel compelled to design or redesign their

plans, if possible,[37] to take advantage of the protection afforded to spendthrift trusts under state law, and fiduciaries may find themselves exposed to liability for not having taken whatever steps are available to qualify their plans as spendthrift trusts under applicable state law (or for failing to have done so quickly enough to protect all their participants). As a result, state law, rather than ERISA, will supply the minimum standards for plan design.

Furthermore, to defend the interest of plan participants, prudent fiduciaries may find themselves forced to engage in extensive litigation over the state-law status of their plan. A favorable outcome on the issue of the plan's status as a spendthrift in one bankruptcy proceeding cannot be pled as *res judicata* in a subsequent bankruptcy proceeding against different parties. *See Hansberry* v. *Lee*, 311 U.S. 32 (1940). Therefore, plan sponsors will be in and out of bankruptcy courts on a regular basis, relitigating the state-law status of their plans, at least until they lose under circumstances where an adverse ruling can be raised against them as collateral estoppel. Typically, plan documents treat such litigation costs as an administrative expense, so that even solvent participants will pay part of the cost of such litigation. This result is at odds with this Court's holding in *FMC Corp*. v. *Holliday*, 111 S. Ct. 403, 408 (1990), where a state anti-subrogation law was held preempted by ERISA because the costs associated with being subject to differing state regulations would "produc[e] inefficiencies that employers might offset with decreased benefits."

[37] There is good reason to doubt that plans can fully transform themselves into state-law spendthrift trusts, to the extent they are not already spendthrift trusts. ERISA's "anti-cutback" rule generally prohibits the imposition of new restrictions on a participant's ability to withdraw benefits already accrued under the plan. *See* ERISA § 204(g)(2)(B), 29 U.S.C. § 1054(g)(2)(B), I.R.C. § 411(d)(6), *and* Treas. Reg. § 1.411(d)-4.

Most significantly, if Section 541(c) is denied its full meaning, fiduciaries also will run the risk that their plans will be disqualified under some circumstances if they make distributions of plan assets to bankruptcy trustees. In a series of private letter rulings, the Internal Revenue Service has opined that a turnover of a participant's accrued benefits to a bankruptcy trustee will result in plan disqualification under I.R.C. § 401(a)(13).[38] The effect of plan disqualification on the retirement income security of employees is disastrous: further contributions to their plans are taxable when made, and under certain circumstances, vested participants are taxed on their funded benefits, even if those benefits are not in pay status. I.R.C. § 402(b). Furthermore, in all cases the plan will become taxable on its investment income. *Cf.* I.R.C. § 501(a). In addition, the employer may not deduct its contributions to a disqualified defined benefit plan, and therefore is unlikely to continue such a plan. *See* I.R.C. § 404(a)(5) *and* Treas. Reg. § 1.404(a)-12. Nor are these catastrophes confined to the debtor: since plan disqualification imposes these burdens on *all* participants, the bankruptcy of a single participant could destroy the hopes of thousands of others for a secure retirement.

Subjecting the rights of plan participants and the duties of plan fiduciaries to state law is utterly inconsistent with this

[38] *See, e.g.*, Private Letter Rulings 8131020 (May 5, 1981); 9109051 (December 5, 1990); 9011037 (December 20, 1989); 8951067 (September 28, 1989); and 8829009 (April 6, 1988).

The IRS might have ruled that it would disqualify a plan because of distributions to debtors' estates only if the plan was a state-law spendthrift trust. Even if the IRS had taken this more limited position, a plan administrator would nonetheless risk causing an inadvertent disqualification if it turned over plan assets on the assumption that the plan was not a spendthrift trust under applicable state law, and subsequently the IRS determined that the plan was a spendthrift trust.

Court's understanding of the fundamental premises of ERISA.[39] Preserving pension and welfare plan benefits from "the threat of conflicting inconsistent State and local regulation" was described as "the crowning achievement" of ERISA. 120 Cong. Rec. 29197 (1974) (remarks of Rep. Dent).[40] So strong was Congress's intention to preempt the field of benefit plan regulation that this Court has read ERISA's preemption clause, ERISA § 514(a), 29 U.S.C. § 1144(a), to preempt state regulation of matters on which ERISA is silent, *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983), and even to preempt state regulation seemingly designed to promote ERISA's purposes, *Mackey* v. *Lanier Collection Agency & Service*, 486 U.S. 825, 829-30 (1988).

3. The substantial deviations from national retirement income policy entailed in denying Section 541(c)(2) its plain meaning are unjustified. To permit a lender to reach pension plan assets in bankruptcy would be to confer "a windfall merely by reason of the happenstance of bankruptcy." *Lewis* v. *Manufacturers Nat'l Bank*, 364 U.S. 603, 609 (1961). Outside bankruptcy, creditors cannot look to the assets of an ERISA-governed pension plan. *Guidry*, *supra*, 493 U.S. at 371-72.

4. Finally, the prospect that some plan beneficiaries might be able to shield substantial sums in pension plans before filing for relief under the Bankruptcy Code has played a

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[39] Time after time, this Court has upheld Congress's intention that "pension plan regulation [be] exclusively a federal concern." *Alessi*, *supra*, 451 U.S. at 523. "In the past, we have not hesitated to apply ERISA's preemption clause to state laws that risk subjecting plan administrators to conflicting state regulations." *FMC Corp.* v. *Holliday*, 111 S. Ct. 403, 408 (1990).

[40] *See also id.* at 29,933 (Remarks of Sen. Williams) *and esp.* 120 Cong. Rec. 29,942 (Remarks of Sen. Javits) ("the interests of uniformity with respect to interstate plans require[s] . . . the displacement of State action in the field of private employee benefit programs").

disproportionately large part in the jurisprudence of Section 541(c)(2).[41] The typical pension plan participant — whether a participant in a plan sponsored by a major employer or in a plan of modest size — has little control over the amount or timing of contributions to his or her plan.[42] A more narrowly tailored remedy, use of the power to avoid fraudulent conveyances under 11 U.S.C. § 548, is available in the rare instances of abuse.[43] The protection given by ERISA § 206(d), 29 U.S.C. § 1056(d), to employee contribu-

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[41] *See, e.g.*, *Goff*, *supra*, 706 F.2d at 577, 588; *Daniel*, *supra*, 771 F.2d at 1357. *See also Graham*, *supra*, 726 F.2d at 1270 (plan amended three days before bankruptcy to make benefits unavailable to debtor except upon total disability or at age 65).

[42] Employer contributions are subject to numerous limitations under the Internal Revenue Code. *See* I.R.C. §§ 401(a)(4), 401(k), 401(m), 402(g), 404, 415 and 4972 (1988). Employee contributions are typically made under rules that assume that the plan will comply with the Internal Revenue Code limits. Excess distributions and excess contributions are subject to excise taxes. I.R.C. §§ 4980A and 4972 (1988).

Congress tightened ERISA's contribution limits in the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324 (1982), *see generally* Notice 83-10, Questions and Answers Relating to Amendments to Employee Plans Provisions of the Internal Revenue Code by the Tax Equity and Fiscal Responsibility Act of 1982, 1983-1 C.B. 536-38, and again in the Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085, *see generally* Notice 87-21, Employee Plans — New Limitations on Contributions and Benefits Under Section 415, 1987-1 C.B. 458-66, *and* Notice 89-45, Employee Plans — Application of Section 415(b)(5)(D), 1981-1 C.B. 684.

[43] *Cf. Pulaski Highway Express Co.* v. *Central States, S.E. & S.W. Areas Health & Welfare and Pension Funds*, 41 B.R. 305, 308-12 (Bankr. D. Tenn. 1984).

Guidry, *supra*, 493 U.S. at 371-72, need not be read as prohibiting recovery of fraudulently transferred plan contributions. *Guidry* applies only to remedies for judgments against a plan participant in personam, not to a judgment that property was transferred with the intent to hinder, delay or defraud creditors, the operation of which ordinarily is limited to recovery of the property from the transferee. *See generally* 37 C.J.S. *Fraudulent Conveyances* § 444 (1943).

tions that are within the limits established by Congress can be regarded as the result of "a considered congressional policy choice . . . to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless), even if that decision prevents others from securing relief for the wrongs done them." *Guidry*, *supra*, 493 U.S. at 376.

CONCLUSION

There is no basis in the language of Title 11, nor in any rule of construction or consideration of policy, for failing to read Section 541(c)(2) literally. To the contrary, limiting Section 541(c)(2) guarantees that some plan participants will lose their pensions and that plan administration will be governed in part by various conflicting state laws — results completely at odds with national retirement income policy established by ERISA and upheld repeatedly by this Court. For the foregoing reasons, *amici* request that the judgment below be affirmed.

Respectfully submitted,

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March 31, 1992

APPENDIX

APPENDIX

THE ERISA INDUSTRY COMMITTEE MEMBERSHIP LIST March 24, 1992

Aetna Life & Casualty Co.

Alexander & Alexander Services, Inc.

Allied-Signal Inc.

Aluminum Company of America

AMAX Inc.

American Express Company

American Home Products Corp.

American International Group, Inc.

American National Can Company

American Telephone & Telegraph Company

Ameritech

Amoco Corporation

Apache Corporation

Ashland Oil, Inc.

Atlantic Richfield Company

Ball Corporation

Bankers Trust Company

Becton Dickinson & Co.

Bell Atlantic Corporation

Bell Communications Research

BellSouth Corporation

Bethlehem Steel Corporation

The Boeing Company

BP America Inc.

Bristol-Myers Squibb Company

Buck Consultants, Inc.

Caterpillar Inc.

Champion International Corporation

The Chase Manhattan Bank N.A.

Chevron Corporation

Chrysler Corporation

CIBA-GEIGY Corp.

CIGNA Corp.

Citibank, N.A.

Coopers & Lybrand

Dana Corporation

Deere & Company

Delta Air Lines Inc.

Digital Equipment Corp.

The Dow Chemical Company

Dresser Industries Inc.

Du Pont Company

Eastman Kodak Company

Eli Lilly and Company

Enron Corp.

Equitable Life Assurance Society of the United States

Exxon Corporation

Federated Department Stores, Inc.

FMC Corporation

Ford Motor Company

A. Foster Higgins & Co., Inc.

General Electric Company

General Motors Corporation

W. R. Grace & Co.

Grand Metropolitan PLC

Grumman Corporation

GTE Corporation

Frank B. Hall & Co., Inc.

John Hancock Mutual Life Ins. Co.

Hazlehurst & Associates, Inc.

The Hearst Corporation

Hewitt Associates

Hewlett-Packard Co.

Honeywell Inc.

ICI Americas Inc.

International Business Machines Corporation

International Paper Company

International Telephone & Telegraph Corporation

Johnson & Johnson

Kraft Inc.

Lincoln National Corporation

LTV Corp.

Manufacturers Hanover Trust Co.

The Mead Corporation

William M. Mercer, Incorporated

Merck & Co. Inc.

Metropolitan Life Insurance Co.

Minnesota Mining & Manufacturing Co.

Mobil Oil Corp.

MONY Financial Services

J. P. Morgan & Co. Incorporated

Motorola, Inc.

Navistar International Corporation

NYNEX Corp.

Occidental Petroleum Corporation

Olin Corporation

Pacific Gas & Electric Company

Pacific Telesis Group

J. C. Penney Co., Inc.

Pennzoil Company

Pfizer Inc.

Philip Morris, Inc.

PPG Industries, Inc.

Price Waterhouse

Procter & Gamble Co.

The Prudential Insurance Company of America

Ralston Purina Co.

Reynolds Metals Co.

RJR Nabisco, Inc.

Rockwell International Corporation

Ryder System, Inc.

Schering - Plough Corporation

Scott Paper Company

Sears, Roebuck and Co.

Shell Oil Company

Siemens Corporation

The Southland Corporation

Supermarkets General Corp.

Tenneco Inc.

Texaco Inc.

Texas Instruments, Inc.

Textron Inc.

Time-Warner Incorporated

Towers Perrin Forster & Crosby

Travelers Insurance Company

TRW Inc.

Unilever United States, Inc.

Union Camp Corporation

Union Carbide Corporation

United Technologies Corporation

Unocal Corporation

U.S. West, Inc.

USX Corp.

Westvaco Corporation

Whirlpool Corporation

The Wyatt Company

**ASSOCIATION OF PRIVATE PENSION AND WELFARE PLANS, INC.
MEMBERSHIP LIST
March 23, 1992**

A. Foster Higgins & Company, Inc.

Abarta, Inc.

Actuarial Sciences Associates, Inc.

Aerojet Headquarters

Aetna Life Insurance Company

Alexander & Alexander Consulting Group

Allied-Signal, Inc.

Aluminum Company of America

American Express Company

American Family Insurance Group

Ameritas Life Insurance Corp.

Ameritech, Inc.

Amoco Corporation

Arthur Andersen & Company

Associated Benefits Corporation

The Associated Group

ACTI

Association of Investment Management Sales Executives

ARA Services

ARMCO Inc.

B. Green & Company, Inc.

Bank of America

Bankers Trust Company

Baxter Healthcare Corporation

Bechtel Investments, Inc.

Bell Atlantic

BellSouth Corporation

Benefit Controls of S.C., Inc.

Blue Cross Blue Shield of Illinois

Blue Cross Blue Shield of Virginia

Boeing Company

Booke & Company

The Boston Company

Bryan, Pendleton, Swats, et al

Buck Consultants, Inc.

Burlington Industries

Burnett Company, Inc.

BANC ONE Corporation

BASF Corporation

BF Goodrich Company

Capital Guardian Trust Co.

The Chase Manhattan Bank, N.A.

CIGNA

Citibank

The Coastal Corporation

The Coca-Cola Company

Colgate-Palmolive Company

Columbia Gas System Service Corp.

Connecticut Mutual Life Ins. Co.

Continental Bank Corporation

ConAgra, Inc.

Cooper Industries, Inc.

Coopers & Lybrand

Coors Brewing Company

Council of Smaller Enterprises

Cox Enterprises, Inc

Crane Plastics Company

Crestar Bank

CBI Industries

CIGNA Corporation

CNA Insurance Companies

Daughters of Charity NHS

Digital Equipment Corporation

Dover Corporation

Dow Chemical Company USA

Duff & Phelps Financial Consulting

The Du Pont Company

Dyatron Corporation

Eastman Kodak Company

Empire Blue Cross & Blue Shield

Enron Corp.

Energy Services, Inc.

Epler Company

Equitable Life Assurance Society

Ernst & Young

Ethyl Corp.

Exxon Company, U.S.A.

Faegre & Benson

Federal Express

Fidelity Investments

Findley, Davies & Co.

First Interstate Bank

First Southern Trust Company

First Wachovia Corporation

Flagship Benefit Consultants, Inc.

Foley & Lardner

Food Marketing Institute

Gardner, Carton & Douglas

Gast Manufacturing Corporation

GenCorp

Gilbert, Segall & Young

Godwins, Inc.

Grand Aerie Fraternal Order of Eagles

Greenebaum Doll & McDonald

Group Health Coop. of Puget Sound

Grubbs and Company, Inc.

Guardian Industries Corp.

GATX Corporation

GTE Investment Management Corp.

Hallmark Cards, Inc.

Harris Trust & Savings Bank

Hay/Huggins Co., Inc.

Hazelhurst & Associates

Hershey Foods Corporation

Hewitt Associates

Hillyard Chemical Company

Holy Cross Shared Services, Inc.

Hooker & Holcombe, Inc.

Houston Lighting & Power Company

Hutchison & Associates, Inc.

Ingersoll-Rand Company

Insurer Central Services

Integrated Marketing Services

Inter-Local Pension Fund GCIU

ICI Americas, Inc.

IDS Financial Services

ITT/Hartford Insurance

Jenner & Block

John Hancock Mutual Life Ins. Co.

Johnson & Gibbs

Kraft General Foods

Kwasha Lipton

KPMG-Peat Marwick

Lawson Mardon Group Limited

Leggette & Company, Inc.

LeBoeuf, Lamb, Leiby & MacRae

Liberty Mutual Insurance Company

Litton Industries, Inc.

Lockheed Corporation

Loyola University of Chicago

Lynch, Jones, & Ryan

Mockenhaupt, Mockenhaupt, Cowden & Parks, Inc.

Maritime Overseas Corporation

Marriott Corporation

Massachusetts Financial Services

Massachusetts Mutual Life Ins. Co.

McCready and Keene, Inc.

McDermott, Will & Emery

McDonalds Corporation

The Mead Corporation

Mercedes-Benz of North America

Merck & Co., Inc.

Merrill Lynch

Metropolitan Life Insurance Co.

Miller Mason & Dickenson

Milliman & Robertson, Inc.

Mobil Oil Corporation

Money Market Directories, Inc.

Monsanto Company

Montgomery, McCracken, Walker et al

The Moore Company

Motorola Inc.

Mrs. Baird's Bakeries, Inc.

MAPCO Inc.

National Life Insurance Company

National Manufacturing Company

Nationwide Insurance Company

New England Investment Market, Inc.

New York GIC Exchange

New York Life Insurance Co.

Noble Lowndes

The Northern Trust Company

Nyhart-Company, Inc.

National Automobile Dealers & Associates Retirement

Ogle & Waters

ORYX Energy Company

Pacific Enterprises

Pacific Telesis Group

Paducah Newspapers, Inc.

Paine Webber

Patterson, Belknap, Webb & Tyler

PCI, Inc.

Pension Associates, Inc.

Pension Planning Co., Inc.

Philip Morris

Phillips Petroleum Company

Premark International, Inc.

The Principal Financial Group

Providence Journal Company

Provident Capital Management

Prudential Asset Management Co.

Purity Dairies, Inc.

The Putnam Companies

Raleigh Schwarz & Powell, Inc.

Reid and Reige, P.C.

Retirement System Group Inc.

Rock-Tenn Company

Rogers Benefit Group, Inc.

RJR Nabisco, Inc.

Sedgwick James Consulting Group

The Segal Company

Shell Oil Company

Shields Asset Management Inc.

Siegel Benefit Consultants, Inc.

Siemens Corporation

Signet Banking Corporation

The Southern Company

Southwestern Bell Corp.

Springs Industries, Inc.

Standard Insurance Company

Star Enterprise

State of Maryland, Personnel Dept.

State Mutual Companies

State Street Bank & Trust Co.

Steptoe & Johnson

Sun Company, Inc.

SAFECO Life Insurance Company

Tektronix, Inc.

Toshiba America, Info Systems, Inc.

Towers Perrin

Transamerica Life Ins. & Annuity Co

The Travelers Insurance Companies

Union Labor Life Insurance Co.

United Parcel Service, Inc.

United Telecommunications, Inc.

University of California

UIU Pension Trust

UNISYS Corporation

UNUM Life Insurance Company

USAA

US West, Inc.

Valero Energy Corporation

Vermont American Corp.

Vulcan Materials Company

VASA Brougher Inc.

W F Corroon

W. R. Grace & Co.

Washington Post

Webcrafters, Inc.

Westinghouse Electric Corporation

Weyerhaeuser Company

William M. Mercer, Incorporated

Willis Corroon Corporation

Willse & Associates, Inc.

Winn, Beaudry & Virden

Winthrop, Stimson, Putman & Roberts

Wm. Wrigley Jr. Company

The Wyatt Company

Y.M.C.A. Retirement Fund